

SENATE FINANCE COMMITTEE
THIRD SPECIAL SESSION
August 30, 2021
3:00 p.m.

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CALL TO ORDER

Co-Chair Stedman called the Senate Finance Committee meeting to order at 3:00 p.m.

MEMBERS PRESENT

Senator Click Bishop, Co-Chair
Senator Bert Stedman, Co-Chair
Senator Donny Olson (via teleconference)
Senator Bill Wielechowski (via teleconference)
Senator David Wilson (via teleconference)

MEMBERS ABSENT

Senator Natasha von Imhof
Senator Lyman Hoffman

ALSO PRESENT

Alexei Painter, Director, Legislative Finance Division;
Neil Steininger, Director, Office of Management and Budget,
Office of the Governor; Megan Wallace, Director,
Legislative Legal Services, Alaska State Legislature; Kris
Curtis, Legislative Auditor, Alaska Division of Legislative
Audit.

PRESENT VIA TELECONFERENCE

Cori Mills, Deputy Attorney General, Department of Law,
Juneau.

SUMMARY

^REINTERPRETATION OF SWEEP FUNDS

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ALEXEI PAINTER, DIRECTOR, LEGISLATIVE FINANCE DIVISION,
discussed, "Constitutional Budget Reserve Sweep Overview;

Senate Finance Committee; August 23, 2021; Legislative Finance Division" (copy on file). He looked at slide 2, "CBR Sweep Mechanism":

The CBR sweep provision was established in Article IX, Section 17 of the Alaska Constitution:

(d) Repayment requirement --"If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law."

Mr. Painter discussed slide 3, "Reverse Sweep":

- The "reverse sweep" is an appropriation from the CBR that returns swept funds back to the original subfund or account. The "reverse sweep" is an appropriation under art. IX, sec. 17(c), and requires a 3/4 vote to pass.
- The sweep is effective at the end of a fiscal year (June 30) and the reverse sweep is effective on the first day of the following fiscal year (July 1).

Co-Chair Stedman clarified that Mr. Painter was referencing having accounts start with a balance greater than zero. If the sweep was not reversed, the balance on most of the funds would be zero. The action basically constituted a beginning account balance for cash flow purposes.

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Mr. Painter looked at slide 5, "How the Sweep Works":

- The Department of Administration's Division of Finance (DOF) accountants calculate the sweep while preparing the Annual Comprehensive Financial Report (ACFR). The sweep represents unreserved, undesignated fund balances of the general fund subfunds
- DOF accountants calculate the sweep in September as the ACFR is prepared yet the amount of the sweep is posted in the financial records as of the end of the fiscal year (June 30th).

- After the ACFR is prepared (historically by the end of October), the ACFR is audited by the legislative auditor. The sweep amount is adjusted as necessary.

Mr. Painter reiterated that the classic view of the sweep was that the amounts reported in the Annual Comprehensive Financial Report (ACFR) represented the balances as of June 30, with only adjustments for appropriations that had taken effect by June 30.

Mr. Painter addressed slide 8, "Impact of Sweep on the Budget":

- Based on the list of funds swept in FY20 by the Division of Finance, the FY22 budget uses \$367.4 million from sweepable funds. Subtracting the PCE fund would reduce that to \$321.2 million.
- Not all funds are impacted equally, however. LFD breaks them into three categories:
 1. Immediate Impact: No ongoing source of revenue to support appropriations.
 2. Partial Impact: Ongoing source of revenue that is insufficient to support appropriations.
 3. Minimal/No Impact: Ongoing source of revenue fully covers appropriations.

Mr. Painter addressed slide 9, "Summary of Impacts by Category," which showed a table. He mentioned the category of 'Immediate Impact Pending Interpretation,' which was the Statutory Budget Reserve (SBR), which was still a sweepable fund. He explained that the fund was still sweepable but there were suggestions it may not be sweepable based on the findings of a recent court ruling. He noted that there were key numbers across the bottom of the table, including the projected sweep balance of nearly \$1 billion. He continued that \$321.2 million was used out of the funds. There was a projected shortfall of \$141.95 million in the various accounts, where the ongoing revenue was insufficient to make the appropriations. He relayed that the administration would speak to how the shortfall might be impacted by its new interpretation sweep mechanics.

Co-Chair Stedman asked about a brief review of the impacts.

Mr. Painter looked at slide 10, "Immediate Impact," which showed two tables, with the top showing the impact to the Alaska Higher Education Investment Fund. The fund had no ongoing source of revenue other than investment revenue on the fund balance, and the entire amount of appropriations made out of the fund would be a shortfall due to the lack of a reverse sweep. The bottom table showed the impact to the SBR, which if swept, would leave all the appropriations out of the fund "hollow."

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Mr. Painter pointed to slide 11, "Items Funded with Statutory Budget":

Reserve in FY22 Budget

- Governor vetoed \$320.0 million appropriation for Permanent Fund Dividends from the SBR, along with \$362.5 million from the general fund.
 - If the SBR is swept, this would have resulted in a PFD estimated to be \$525. If the SBR is not swept, the vetoed PFD would have been estimated to be \$1,025.
- SBR also funds \$4.15 million for School Debt Reimbursement in FY22.
- SBR was used to fund \$76.5 million of capital projects, including:
 - \$10 million for Mat Su Borough Pavement Rehab
 - \$9 million for Houston Middle School
 - \$8.5 million for West Susitna Access
 - \$36.5 million of projects in the Department of Natural Resources, including \$10 million for firebreak construction
 - \$6.3 million of projects in other agencies

Mr. Painter addressed slide 12, "Partial Impact," which showed a table of funds that had some ongoing revenue that was insufficient to fully offset the appropriations. The projected sweep balance of the funds was \$104.5 million, but the amount used in the FY 22 budget was \$168.5 million because of the assumption of ongoing revenue in many of the funds. The amount available after the CBR sweep was the ongoing revenue. The numbers were based on the Department of Revenue's (DOR) spring forecast. The shortfall was the difference between the ongoing revenue and the appropriations. The table showed how much of the prior fund balance was being used in the budget.

Mr. Painter pointed to slide 13, "Minimal/No Impact," and noted that many of the funds were not used in the FY 22 budget. He used examples including the Vessel Replacement Fund and the Railbelt Energy Fund. Other funds were used in the budget, but the amount used was less or equal to the amount of ongoing revenue. He used the example of the Technical Vocational Education Program (TVEP) account, which after a fiscal note was in balance. While there was some swept balance, the ongoing revenue was sufficient to pay for all the appropriations out of the listed funds.

Co-Chair Stedman asked the director of the Office of Management and Budget (OMB) to help with the new interpretation of the reverse sweep and the accounts, and asked why there was a sudden change after the presentation on August 24, 2021. He posited that there had been a "radical change in direction" shortly after the recent presentation.

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NEIL STEININGER, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF THE GOVERNOR, recounted that on August 25, the attorney general had sent a memo to the governor (copy on file), outlining that appropriations made in HB 69 could be counted as valid commitments since the bill was signed into law prior to midnight on June 30. He continued that OMB was forwarded the memo as well as instructions to implement the interpretation and release any funds from sweepable funds appropriated in HB 69. He summarized that the impacts or shortfalls described by Mr. Painter would no longer impact the appropriations. The administration had released only the funds that were "validly" appropriated by HB 69. The balances of the funds would still be swept per the terms of the constitution, the only change was what would count as a valid commitment under the constitutional provision. When OMB presented to the committee on August 24, it was still operating under the prior interpretation that the commitments were not validly committed until the effective date. The attorney general's opinion had changed the interpretation.

Co-Chair Stedman asked if Ms. Steininger could recall how long the state had operated under the previous guidelines.

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Mr. Steininger thought the previous interpretation had been in place since the early 1990s, when the administration began interpreting the sweep in the ACFR.

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Co-Chair Stedman mentioned the SBR and a 2021 Superior Court ruling related to the Alaska Federation of Natives (AFN) and Power Cost Equalization (PCE) Fund, which had found that the PCE Fund was not sweepable and inferred the SBR could not be swept. He asked why the administration would not follow the court finding.

Mr. Steininger replied that the AFN case directly ordered the administration to not sweep the PCE Fund. There had been reference to the SBR in the footnote of the case, but there was not a direct order not to sweep the fund. He furthered that until further direction was given otherwise, the administration was applying a status quo interpretation regarding the SBR being sweepable.

Co-Chair Stedman asked if there had been an order to reinterpret the remaining sweep items other than the PCE Fund.

Mr. Steininger did not believe there was an order to reinterpret the other items in the AFN decision. He deferred to the Department of Law.

Co-Chair Bishop thought Mr. Steininger had mentioned the administration would continue "until receiving guidance," and wondered who or what he was referring to.

Mr. Steininger explained that until the administration received direction either from the attorney general or the courts regarding changing the interpretation of the SBR in terms of "sweepability," it would continue to follow the status quo from prior years and consider the fund to be sweepable.

Co-Chair Stedman thought there was a conflict between and the status quo and otherwise.

Senator Wilson wondered if the PCE Fund decision applied to all payments from the fund, such as community assistance payments.

Mr. Steininger stated "yes," and explained that per the AFN decision, any appropriation from the PCE Fund was allowed to go forward and was now being implemented in the state budget. The payments included community assistance, the PCE Program itself, the cost of managing the fund, and other appropriations from the fund.

Senator Wielechowski was curious about how the court decision affected the SBR appropriations.

Mr. Steininger stated that per the attorney general's memo and direction from the governor, the appropriations were considered to be validly committed prior to the time of the sweep, so the appropriations could go forward.

Senator Wielechowski asked about the West Susitna Access Road Project, the Houston school, and other projects.

Mr. Steininger answered affirmatively, and qualified that mostly capital projects would go forward.

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Co-Chair Stedman remarked that mostly the projects were concentrated in a specific geographical area. He asked Mr. Steininger to help the committee with an explanation of the mechanics of the administration's interpretation of the sweep. He asked how the cash flow would work, and if the administration would need to wait to receive revenue before spending it.

Mr. Steininger stated that the mechanics would operate similarly to a year in which the reverse sweep occurred. The departments would be able to execute appropriations, and the administration would utilize inter-fund borrowing in situations where revenue may be less in the first quarter than was necessary for expenditures, but adequate over the course of the entire fiscal year. In some situations there would be a lag between expenditures and revenue, which he thought was normal for operation of a state budget. In situations where the state relied upon the balance of the fund, the administration would be able to expend from the balance. There would be accounting reconciliation done by the Division of Finance to ensure that the amount swept into the Constitutional Budget Reserve (CBR) was accurate. He noted that the

administration would need to work through the process with the division to ensure that adequate tracking and accounting happened in the ACFR.

Co-Chair Stedman asked if the committee should expect that the ACFR would have less complications and flagged issues, or more.

Mr. Steininger did not want to speculate. He knew the Division of Finance worked as hard as possible to ensure there were not issues in the ACFR when it was submitted to the Legislative Audit Division.

Senator Wielechowski thought it looked like the Matanuska-Susitna (Mat-Su) Borough rehabilitation payment of \$10 million had been approved. He thought some of the funding went towards paving roads. He was curious if the borough had road conditions that were worse than other parts of the state that necessitated the discretionary \$10 million, or if the governor planned to veto the funding.

Mr. Steininger replied that the governor's opportunity to veto or not veto the appropriation happened when the bill was signed. The administration had put forward the request, which was appropriation by the legislature, based upon road conditions in the region.

Senator Wielechowski thought the discretion for use of the funds was up to the borough. He asked if it was the governor's position that the roads in the Mat-Su Borough were worse than roads in rural Alaska, certain parts of Anchorage, and other parts of the state.

Mr. Steininger did not mean to imply that there were worse or better conditions of the roads, simply that the appropriation was put forward and vetted during the legislative session and appropriated by the legislature. He continued that the appropriation was impacted by the memo by the attorney general as to whether or not the funds from the appropriation could be put forward to be executed based on the interpretation on what funds were subject to the sweep or not. He contended that the interpretation did not have any bearing on the validity of a project, it simply looked at legal issues determining what balances were available for the sweep.

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Co-Chair Stedman clarified that Mr. Steininger was correct in that the legislature was the appropriating body and had appropriated the funds. The appropriation had come in as an amendment from the governor for the capital budget, and the legislature had not added any projects to the capital budget. The items were all either recommended for the bond package or amendments from the administration. All appropriations in the final budget bill were approved with a vote of the legislature.

Senator Wielechowski was curious if Mr. Steininger could explain why the attorney general was interpreting the end of the succeeding fiscal year to come after the start of the next fiscal year.

Co-Chair Stedman asked Senator Wielechowski to repeat his question.

Senator Wielechowski thought the matter was complicated and noted that the topic was included in the attorney general's opinion. He was curious if Mr. Steininger was interpreting the end of the succeeding fiscal year to come after the start of the next fiscal year.

Co-Chair Stedman thought the question would be best addressed by the Department of Law.

Senator Wielechowski was curious if the governor believed that that oil tax credits should be funded at the full or more statutory level if the Permanent Fund Dividend (PFD) was funded at less than the statutory level.

Mr. Steininger explained that in the administration's budget during session, it had put forward the full amount for oil and gas tax credits and had proposed to pay a PFD at a 50/50 split based on its proposed fiscal plan.

Senator Wielechowski asked if the governor would support an amendment that linked the amount of the PFD to the percentage of oil tax credits.

Mr. Steininger declined to answer the question on behalf of the governor.

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CORI MILLS, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF LAW, JUNEAU (via teleconference), gave a brief explanation of the memorandum from the attorney general dated August 25, 2021. She recounted that the Department of Law had been asked by the governor to look at the question of monies for which an appropriation for an expenditure had already been enacted prior to the sweep, were those not available for appropriation because the funds had already been validly committed. She commented the one of the things the PCE endowment fund case highlighted was that there was still a lot of uncertainty around the interpretation of the CBR.

Ms. Mills referenced the Supreme Court case Hickel vs. Cowper [a 1994 case regarding funds available for appropriation], and a case interpreting "available for appropriation." She thought there were a series of unanswered questions on the matter, especially as it related to the sweep and subsection (d), because the Hickel v. Cowper dealt mostly with subsection (b), which concerned how to compare the previous year and what monies were available for appropriation. Additionally, the subsection concerned if money could be taken out of the CBR by a majority vote or by a three-quarters vote.

Ms. Mills continued to address the memorandum and relayed that the department had found that there was a reasonable argument, based on a reading of Hickel v. Cowper and the interpretation of "available for appropriation", that funds that were part of an enacted appropriation had already been validly committed to be expended for a specific purpose in the future. Because the funds were validly committed, it meant the funds were not available for appropriation as of June 30, at midnight, and should not be swept with the remainder of the fund.

Ms. Mills referenced two quotes from the Hickel v. Cowper case that she considered "the crux" of the question. She detailed that the case defined "available for appropriation" in the following manner: amounts available for appropriation, within the meaning of Article 9, Section 17, of the Alaska Constitution, includes all monies over which the legislature has retained the power to

appropriate, and which require further appropriation before expenditure. The court also made clear that "monies which have already been validly committed by the legislature to some purpose should not be counted as available.

Ms. Mills pondered whether the appropriations in the budget bill HB 69 (signed into law on June 30) were validly committed prior to the sweep and therefore should not be swept and instead used for the purposes intended on the effective date. Conversely, she pondered whether the appropriations were not validly committed yet because the appropriations were not in effect yet. She summarized that the department believed there was a reasonable argument that the appropriations were validly committed, and therefore the action and direction given by the governor was legally defensible and could be upheld by the court. She qualified that ultimately the department did not know what the court would determine.

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Co-Chair Stedman wondered how almost thirty years of precedent did not have any bearing on the issue. He asked how Ms. Mills had dealt with the issue, or if all the previous governors, legislators, finance directors, and OMB directors had misinterpreted the issue.

Ms. Mills replied that she felt that the question had always been present but it had not been addressed by any governor. She thought there was always a chance that there would be different answers to the question once it was asked. She thought the ongoing policy interpretation did weigh into the matter but did not mean there was not a reasonable argument that the process had not been done correctly. She mentioned the Supreme Court reversing things, and referenced the PFD, and the State v. Wielechowski decision [a 2017 case to effectively set aside the governor's veto of a portion of the appropriation of funds for PFD distributions in 2016] where the court had reversed 30 to 40 years of action.

Ms. Mills asserted that the department was always considering case law and the constitution, and referenced the recent PCE case decision, which she thought could change the way the process could be interpreted. She thought there were reasonable arguments on both sides.

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Co-Chair Stedman referenced the closing paragraph of the August 25th memo from the attorney general, which started with a reference to "a particular concern." He thought the attorney general considered that the administration would be in a tricky situation through the interpretation. He referenced the second paragraph, which referenced making "a reasonable argument." He posited that a reasonable argument could be made about virtually anything in a courtroom.

Ms. Mills agreed that reasonable arguments could be made in court. She thought there was a question of whether an argument had a greater than 50 percent chance, and she thought the interpretation could go either way and the court had yet to weigh in on the matter. She thought there were good legal arguments to make before a court, but the matter would not be decided until the Alaska Supreme Court made a ruling.

Co-Chair Stedman noted that the constitution provided for an attorney general and not an elected attorney general. He was concerned about the disregard for nearly 30 years of precedent while there was a capital budget substantially weighted within one area of the state. He thought it was interesting that the issues coincided. He thought it seemed as though the interpretations coming from the Department of Law seemed to be politically motivated.

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Senator Wielechowski thought a rationale for the court from the PCE case was that funds outside the General Fund were not considered to be sweepable. He was curious about the rationale regarding the Higher Education Fund and noted the governor had reversed his decision on the fund. He thought the fund was within the General Fund.

Ms. Mills agreed. She did not believe the administration had changed its position on the Higher Education Fund and its sweepability as a fund. She continued that the reason the Alaska Performance Scholarship payments could go out was because there were validly committed appropriations in the budget bill to pay the scholarship in the current year. The remainder of the fund was considered swept as of June 30, so there would be no funding to pay scholarships the following year.

Senator Wielechowski thought it appeared that the attorney general was interpreting the end of the succeeding fiscal year to come after the start of the next fiscal year.

Ms. Mills pondered the question of if the funds had been validly committed. She mentioned *Hickel v. Cowper*, which used language that said, "monies which have already been validly committed by the legislature to some purpose should not be counted as available." She continued that if the money had already been validly committed, it was a separate question from when the appropriation was effective and when the money could be spent. She cited that the language in subsection (d) stated that the amount of money in the General Fund available for appropriation at the end of each succeeding fiscal year. She questioned if the money that was already committed to a purpose was available for appropriation at the end of the fiscal year, or if it had been validly committed for the next year's budget and set aside. She thought the question was whether funds had to be spent as of June 30th, or validly committed through an enacted bill for the future.

Ms. Mills commented on the role of the department to advise the governor and other officials within the government, which she thought was accomplished in the memo from the attorney general. She asserted that the department was not claiming there was a clear answer, nor had it taken a public position on the issue. Rather, the department was claiming there were reasonable arguments on both sides. She emphasized that if there were reasonable legal arguments, there was a policy question for elected officials to make.

Co-Chair Stedman thought it sounded as though Ms. Mills wanted to take a step back from the position.

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Senator Wielechowski recalled that the legislature's budget control was over FY 22, after the end of the last fiscal year when the funds were already swept. He asked if the legislature could make an appropriation or simply transfer monies from the various funds into the SBR or the PCE Fund, and then transfer them back in the new fiscal year in order to avoid the funds being swept.

Ms. Mills addressed the PCE Fund, which was not sweepable as a whole under the court's reasoning. She considered that if the legislature were to appropriate money into the PCE Fund, it would definitely be protected from the sweep. She considered Senator Wielechowski's question of if there was an appropriation to take the funds out of the PCE Fund and asked if he meant after the sweep.

Senator Wielechowski answered affirmatively.

Ms. Mills furthered that she thought the funds would be protected and noted that the legislature could always appropriate money from the PCE Fund, and she was not sure the second step would be necessary. She thought if the funds were in the PCE Fund, they would not be swept.

Co-Chair Stedman asked about the retroactive effective dates. He recalled that the administration had threatened to shut down government for 90 days because of lack of a two-thirds vote for retroactive effective dates. He asked if the legislature should delete retroactive dates from budgets.

Ms. Mills thought Co-Chair Stedman had posed distinct legal questions. She explained that the department was interpreting the phrase "available for appropriation," for purposes of the CBR, and the Hickel v. Cowper court considered that the funds been validly committed by the legislature. She pondered the time component. She thought retroactivity was a separate question that was not impacted by the analysis.

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Co-Chair Stedman asked if it would be possible to get a clarification for the next budget cycle. He cited that there were decades of precedence of interpretation followed by a 90-degree change, which he thought was due to the fact that there was political expediency involved. He asked Ms. Mills to help with any information on the issue of retroactive effective dates.

Ms. Mills relayed that the department was happy to provide any guidance it could. She thought the timeline for appealing effective date litigation was upcoming, and she thought there was a chance there would be continued litigation at the Supreme Court level. She thought pursuit

of the litigation would be in aid of gaining clarity and to avoid a constitutional crisis. She relayed that the department had looked back in history and could not identify another time with a similar situation. She pondered that the court could provide clarity before the budget process was over and relayed that the department was happy to weigh in on how the retroactive dates and effective dates worked together in any given bill.

Co-Chair Stedman thought there would be an opportunity the upcoming winter. He commented on the expense of litigation.

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MEGAN WALLACE, DIRECTOR, LEGISLATIVE LEGAL SERVICES, ALASKA STATE LEGISLATURE, explained that she would comment on Legislative Legal Services' (LLS) perspective on the attorney general's opinion issued the previous week and whether it changed the historical understanding of how the sweep worked and any possible risk to the legislature if it continued to budget under the most recent interpretation. She agreed that the issue had not been before the Supreme Court. She pointed out that Ms. Mills noted that there was no new case law on the issue. There was a recent Superior Court decision on the sweepability of the PCE Fund, but the Department of Law's new opinion on how the sweep should be carried out did not rely on the most recent opinion. She explained that LLS' framework was based almost exclusively on *Hickel v. Cowper*, which was an Alaska Supreme Court decision from the early 1990's.

Ms. Wallace explained that *Hickel v. Cowper* was a case about the definition of "available for appropriation" under Article IX, Section 17 (b), the provision that indicated whether a majority vote or three-quarters vote was needed. She continued that *Hickel v. Cowper*, in large part, did not touch on the constitutional sweep in Section 17 (d). She relayed that there was limited guidance in one small section at the end of the opinion that referenced the sweep that said for the purposes of understanding what the language in the sweep provision is, we will look to the same interpretation as those terms were used in subsection (b).

Ms. Wallace contended that the *Hickel v. Cowper* court statements that the Department of Law were relying on were in interpreting Section 17 (b) of the CBR provision and

were not specific to the sweep. She continued to say that when analyzing and determining whether money was validly committed by the legislature, the Hickel v. Cowper case was not specific as to what the provision meant as it related to the sweep. She pondered looking at what money was validly committed as of June 30 when the sweep was carried out, as opposed to looking to see what future appropriations were going to take effect and whether or not the appropriations could be considered validly committed.

Ms. Wallace shared that LLS had historically understood and interpreted the sweep as a snapshot of what was seen on June 30, and had historically considered that money that was swept on June 30 would not be available to carry out appropriations that had been validly enacted for the upcoming fiscal year. She continued that in other words, after the sweep occurred if there was not a reverse, the appropriations would go unfunded. She shared her perspective that without a change in law or updated guidance from the Alaska Supreme Court (or even a Superior Court) specifically taking up the issue, it was difficult to reach a new conclusion.

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Co-Chair Stedman thought there seemed to be some interpretation differences on the matter of the SBR. He asked for Ms. Wallace to help clarify the matter for the committee and the public.

Ms. Wallace explained that before the recent litigation on the PCE Fund, there had been pretty general consensus that the SBR was a sweepable fund. The consensus had been based on language in the Hickel v. Cowper case, in which the parties had conceded that the money in the SBR was available for appropriation. There had never been a suggestion after that time that the fund should not be considered sweepable. Now there was a case from the Anchorage Superior Court that, in analyzing whether the PCE was in the General Fund (which was also a requirement for a fund to be sweepable), it noted that the legislature had the constitutional power to create funds outside the General Fund. In the decision, the court noted that the legislature had created separate funds and footnoted and specifically listed certain funds the legislature had created separate from the General Fund, one of which was the SBR. She recounted that before the recent case

regarding the PCE Fund, there had never been a court analysis of whether the SBR was in the General Fund and whether it was subject to the sweep.

Ms. Wallace continued that based on the AFN case that was not appealed by the governor, if there were a subsequent challenge to the sweepability of the SBR, if a court were to find the Anchorage Superior Court opinion persuasive it would likely find that the SBR was outside the General Fund and not subject to the sweep. She noted that the case was a Superior Court case and unpublished, and therefore would not serve as precedent in the case of subsequent challenges. Rather, the opinion could at most be considered persuasive by another court that analyzed the issue. She summarized that there was still an open question to the extent that the Alaska Supreme Court had not heard the issue; but based on the AFN case the SBR would be considered outside the General Fund and not subject to the sweep.

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Co-Chair Stedman asked if Ms. Wallace had a recommendation as to how the committee should proceed in dealing with the SBR.

Ms. Wallace stated that the only recommendation she could give was that caution was warranted. She expanded that there was a Superior Court case that pretty clearly suggested that the SBR was not sweepable, however the administration had not changed its position or recategorized the SBR. She thought the legislature could face another challenge due to differing opinions as to what money was available and what money was not, and the topic could ultimately be something that needed to be decided. She added that another recommendation would be for the legislature to conservatively budget so that a new decision or interpretation on the issue would not disrupt budgeting assumptions that the legislature was making.

Senator Olson referenced the Superior Court decision regarding the PCE Fund. He wondered if the ruling would stand if the issue was appealed to the Supreme Court and if the legislature should take the matter into consideration.

Ms. Wallace understood that the AFN case would not be appealed to the Alaska Supreme Court. The only way the

issue could get back to the Supreme Court was through separate litigation. She noted that the Alaska Supreme Court did not issue advisory opinions to advise the branches of government on the position of certain legal issues. Rather, there had to be a case or appeal to the Alaska Supreme Court. She thought it was difficult to predict the action of a court but considered that the opinion in the AFN case seemed well-reasoned and it seemed likely the Supreme Court would uphold the decision.

Co-Chair Bishop contended that the PCE Fund had never been considered sweepable prior to the current administration.

Ms. Wallace understood that the longstanding position was that the PCE fund was not sweepable, which had changed on issuance of an opinion by former Attorney General Kevin Clarkson.

Co-Chair Stedman thought the interpretation was relatively new and happened with the current administration.

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KRIS CURTIS, LEGISLATIVE AUDITOR, ALASKA DIVISION OF LEGISLATIVE AUDIT, introduced herself and explained that she was the state legislative auditor responsible for auditing the Annual Comprehensive Financial Report (ACFR).

Co-Chair Stedman relayed that the committee had concerns regarding the difficulty in having more timely audits of financial statements. He mentioned software upgrades and internal accounting, and the issue of the sweep. He wanted Ms. Curtis' opinion on the issue of when a fund was swept and there was an appropriation on the first day of the fiscal year. He wondered how the committee should be viewing the matter through the lens of the auditor.

Ms. Curtis addressed the idea of what funding was available at the end of a fiscal year and emphasized that the balance sheet was as-of June 30th. She asserted that the idea of what was available at the end of June 30 had wider ramifications than the issue of the sweep and mentioned encumbrances and fund balances. She relayed that one of her

first concerns of a new interpretation of how to interpret the amount available had farther implications than the issue of the sweep.

Ms. Curtis emphasized that the issue of what was available had been vetted by the Department of Law, OMB, the Division of Finance, and Legislative Audit when the Hickel v. Cowper decision came out, and that the group had discussed the issue at length. She did not necessarily agree with the interpretation that the issue was not well contemplated. She added that she had not read the PCE Fund-related court case and did not know if the case would inform her in some other way of seeing the matter. She offered that from an audit perspective, it would be difficult to interpret an appropriation effective after June 30 as constituting a valid obligation as of June 30. She affirmed that she and her staff would do a deep dive into the topic, taking a thorough examination of the justification of the department of law and would also engage in discussions with the Division of Finance.

Ms. Curtis noted that there was already a qualification on the state's financial statement, and there was not a clean opinion.

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Co-Chair Stedman asked Ms. Curtis to expand on the qualification on the state's financial statement.

Ms. Curtis explained that the Legislative Audit Division gave an opinion on the state's financial statements as to whether they were fairly stated and free from material misstatement. There were five opinions, one of which was on the General Fund, and one of which was on governmental activities, which was relevant to the issue. The division qualified the General Fund partly because of the amounts that were being deposited into the CBR Fund. The impact was a \$1.4 billion disagreement with the administration that was leading to a qualified opinion; meaning that the division believed there was a material misstatement in the General Fund's financial statement.

Co-Chair Stedman asked Ms. Curtis to re-state her words.

Ms. Curtis reiterated that the division believed there was a material misstatement in the financial statements for the

General Fund. The misstatement had to do with what the division believed was defined and what was owed from the General Fund to the CBR. She continued that the misstatement had to do with the amounts that were deposited to the CBR versus the amounts deposited into the General Fund. The issue was directly related to the same type of issue regarding the sweep, and how much the General Fund owed and repaid the CBR. She relayed that the division already had concerns with interpretations by the administration, on how it was preparing financial statements regarding the CBR. Whether or not it was quantitatively material, the division believed the CBR was qualifiedly material to residents of Alaska and spent a lot of time ensuring that financial statements regarding the sub-fund were accurate. She estimated that the timing of the division's look into the issue would be late fall or early winter.

Ms. Curtis shared another concern with testimony she had heard earlier in the meeting. She thought she had heard it stated that there may be some looking back into the amounts available as of the end of FY 21, decided later in the spring as the monies were balanced, and asserted it could logistically not happen. She emphasized that the financial statements were prepared, and balances were decided as of June 30. She did not understand logistically how the administration planned to change the balances during the year.

Co-Chair Stedman assured that the committee would work on the issue. He thought Ms. Curtis had expressed concerns that appropriations would be released that should not be released under the scenario.

Ms. Curtis explained that the division did not focus on the budgetary aspect of releasing appropriations but were mainly concerned with the amounts in footnote 2 that discussed how much had been taken out or the balance of the CBR, which was the particular area of the financial statements the division had to determine was correct. She iterated that the CBR was a part of the General Fund for financial statement purposes. The discussions did not impact the accounting of or financial statements of the state, but mainly had to do with state compliance and whether the state was following the law. She explained that

footnote 2, which provided the balances, was part of the footnotes to the financial statements.

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Co-Chair Stedman discussed appropriation out of the SBR being swept, and historical precedent. He asked if the new interpretation would cause problems for the financial audit.

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Ms. Curtis thought it would be necessary to look to guidance from the court case and direction from Ms. Wallace. She considered the SBR appropriation sweep to be a separate issue from classifying sub-funds as validly committed as of June 30th. She was not as concerned about the SBR because she had heard that a court case would justify the interpretation.

Senator Wilson asked how long the misstatements in the ACFR had been going on. He asked if it was easy to get a definitive answer on how the statements should be made.

Ms. Curtis shared that the financial statement opinions had been qualified starting in FY 18 and had originated under the prior administration. The new administration came on, and the concerns were brought up to ensure the new administration was in agreement with the prior administration.

Co-Chair Stedman hoped the matters would be cleared up. He thanked the testifiers.

Co-Chair Bishop thought he had heard that until the matter was cleared up, the budget appropriations might need to be doubled for some accounts.

Co-Chair Stedman discussed the schedule.

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ADJOURNMENT

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The meeting was adjourned at 4:16 p.m.